87-705

No. 87-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

UNION PACIFIC RAILROAD COMPANY,
UNION PACIFIC CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
KANSAS CITY SOUTHERN INDUSTRIES, INC.,
KANSAS CITY SOUTHERN RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
BURLINGTON NORTHERN RAILROAD COMPANY, AND
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
*Petitioners,*

v.

ENERGY TRANSPORTATION SYSTEMS, INC., AND
ETSI PIPELINE PROJECT, A JOINT VENTURE, *et al.*,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

B.J. BRADSHAW
RICHARD N. CARRELL
LAYNE E. KRUSE
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, TX 77010
(713) 651-5151

HENRY P. SAILER
GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

JOHN G. BISSELL
STRONG, PIPKIN, NELSON & BISSELL
595 Orleans Street
Beaumont, TX 77701
(409) 835-4581

*Attorneys for Petitioners Union Pacific Railroad Company, Union Pacific Corporation and Missouri Pacific Railroad Company*

[Counsel for other petitioners are identified on the inside cover]

* Counsel of Record

October 1987

O. J. WEBER, JR.
MEHAFFY, WEBER, KEITH & GONSOULIN
P.O. Box 16
Beaumont, TX 77704
(409) 835-5011

JOHN H. SHENEFIELD *
PETER E. HALLE
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

*Attorneys for Petitioners*
*Kansas City Southern Industries, Inc. and*
*Kansas City Southern Railway Company*

LOUIS B. PAINE, JR.
BUTLER & BINION
1600 Allied Bank Plaza
Houston, TX 77002
(713) 237-3111

JOHN R. LABOVITZ
MARK F. HORNING *
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for Petitioners*
*Burlington Northern, Inc. and*
*Burlington Northern Railroad Company*

WALTER J. CRAWFORD, JR.
WELLS, PEYTON, BEARD, GREENBERG, HUNT & CRAWFORD
624 Petroleum Building
550 Fannin Street
Beaumont, TX 77704
(409) 838-2644

GARY SENNER *
STEVEN H. FRANKEL
SONNENSCHEIN CARLIN NATH & ROSENTHAL
233 S. Wacker Drive
8000 Sears Tower
Chicago, IL 60606
(312) 876-8059

*Attorneys for Petitioner*
*Chicago and North Western Transportation Company*

* Counsel of Record

## QUESTIONS PRESENTED

1. Whether, absent fraud upon or collusion with the court, bringing a successful lawsuit can give rise to treble damage liability under the antitrust laws.

2. Whether, absent fraud upon or collusion with the court, defending oneself in a lawsuit brought by a potential competitor can give rise to treble damage liability under the antitrust laws.

3. Whether assisting a State government in prosecuting a successful lawsuit can give rise to treble damage liability under the antitrust laws.

4. Whether first amendment rights and *Noerr-Pennington* protection can be abrogated without consideration of the reasonableness of the litigant's legal position and conduct in the proceedings challenged as sham.

## THE PARTIES BELOW

### *Plaintiffs-Respondents Below*

Energy Transportation Systems, Inc.
ETSI Pipeline Project, A Joint Venture composed of:
Texas Eastern Slurry Transport Company, a subsidiary of Texas Eastern Corporation;
Overseas Bechtel, Incorporated, a subsidiary of Bechtel Petroleum, Inc., a subsidiary of Bechtel Group, Inc.;
Northern Coal Pipeline Company, a subsidiary of Enron, Inc.; and
Slurco Corporation, a subsidiary of K-N Energy Company, Inc.
Arkansas Power & Light Company, a subsidiary of Middle South Utilities, Inc.
Houston Lighting & Power Company and Utility Fuels, Inc., subsidiaries of Houston Industries, Inc.

### *Defendants-Petitioners Below* [1]

Burlington Northern, Inc. and its wholly owned subsidiary Burlington Northern Railroad Company
Union Pacific Corporation and its wholly owned subsidiaries Union Pacific Railroad Company and Missouri Pacific Railroad Company
Kansas City Southern Industries, Inc. and its wholly owned subsidiary Kansas City Southern Railway Company
Chicago and North Western Transportation Company
The Atchison, Topeka & Santa Fe Railway Company [2]

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[1] Pursuant to Rule 28.1, a statement reflecting petitioners' corporate parents, subsidiaries (other than wholly owned subsidiaries) and affiliates has been lodged with the Clerk.

[2] The Atchison, Topeka & Santa Fe Railway Company, a subsidiary of Santa Fe Southern Pacific Corporation, is a defendant in the district court, but was technically not a petitioner in the court of appeals, although it supports petitioners' position.

***Intervenors Below***

State of Iowa
State of Missouri
State of Nebraska

***The District Court***

The Honorable Robert M. Parker, United States District Court, Eastern District of Texas

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No. 87-

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KANSAS CITY SOUTHERN RAILWAY COMPANY,
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CHICAGO AND NORTH WESTERN
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners seek a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in its case No. 87-2177, *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987).

## OPINIONS BELOW

The opinions of the court of appeals, which are reported at 822 F.2d 518, are reproduced at Appendix A, pp. 1a-33a. The order of the court of appeals denying rehearing en banc and panel rehearing is reproduced at Appendix D, pp. 84a-85a. The initial memorandum

opinion and order of the district court, which was vacated pursuant to the court of appeals' writ of mandamus, is not reported; it is reproduced at Appendix B, pp. 34a-58a. The district court's post-mandamus findings of fact, conclusions of law and order, which are not reported, are reproduced at Appendix F, pp. 87a-103a.

## JURISDICTION

The court of appeals conditionally granted the writ of mandamus on July 14, 1987. By order dated August 12, 1987, the court of appeals denied petitioners' timely suggestion for rehearing en banc and declined to grant panel rehearing. App. D, pp. 84a-85a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The first and fifth amendments of the United States Constitution and Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), are set forth in Appendix J, pp. 212a-213a.

## STATEMENT OF THE CASE

1. Petitioners, all western coal-hauling railroads, are defendants in an antitrust suit pending in the United States District Court for the Eastern District of Texas. Respondents, plaintiffs below, are a consortium of pipeline promoters and two of their potential customers. Respondents, together seeking damages of nearly $10 billion (after trebling), allege that the railroads conspired to prevent, through "sham" litigation and other means, construction of an 1,800-mile underground pipeline proposed to transport coal slurry (a liquid mixture of coal powder and water) from mines in Wyoming to electric utilities in Arkansas and Texas.

On February 13, 1987, the district court entered an order below requiring the production of several thousand documents in the railroads' files for which attorney-client

privilege and attorney work product protection had been claimed. The district court's decision rested upon an exception to the attorney-client privilege—the "crime-fraud" exception—which it invoked even though the railroads' alleged "crime" was petitioning conduct presumptively protected—and, in some cases, conclusively protected—by the first amendment and the *Noerr-Pennington* doctrine.

The railroads, pursuant to 28 U.S.C. § 1651(a), sought from the United States Court of Appeals for the Fifth Circuit a writ of mandamus requiring the district court to vacate its order on the ground that the order was clearly erroneous and because it threatened the railroads with irreparable injury. The court of appeals recognized "the exceptional circumstances" making mandamus review appropriate, including the "important and potentially far-reaching" impact of the issues presented. App. A, p. 6a. That court held, on July 14, 1987, that the district court had not made a "proper factual determination that the individual petitioning activities in which the railroads were engaged were sham," and it directed the district court to vacate its order. App. A, p. 30a. All three members of the panel—Judges Brown, Reavley and Jolly—concurred in the result.

The panel members disagreed as to the legal standards that should govern the district court's further consideration of the petitioning conduct challenged by plaintiffs as sham. Judges Reavley and Brown held that the reasonableness of the position advanced in the challenged litigation need not even be considered in evaluating claims of sham litigation. Under the majority's novel test, petitioning would violate the antitrust laws "[1] if the litigation was undertaken without a genuine desire for judicial relief as a significant motivating factor, *or* [2] if there was no reasonable expectation of judicial relief, *or* [3] if there was no reasonable basis for party standing." App. A, pp. 29a-30a (emphasis added).

Thus, even if challenged litigation were reasonably based or successful, the majority would require the district court—and ultimately the jury—to undertake a factual inquiry into the antitrust defendant's subjective intent in bringing (or defending) the challenged suit, as well as a collateral assessment of its standing in that suit. The majority concluded that the test would apply where the antitrust defendant had been a plaintiff in a successful suit, or had assisted the actual litigant—here, a State Attorney General—in prosecuting a successful suit, or had merely defended itself in a suit brought by its competitor.

Judge Jolly, who concurred in much of the majority's opinion and its result, dissented from the majority's holding that a lawsuit "grounded upon a reasonable basis in fact and law may constitute a sham." App. A, p. 33a. He would have held that a "successful lawsuit is not, and cannot be, constitutionally speaking, a sham upon the courts; neither can any lawsuit unless it is *baseless.*" *Id.* at 31a (emphasis in original). Judge Jolly recognized that this principle had been established in numerous cases decided under the *Noerr-Pennington* doctrine and had recently been confirmed by this Court in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 744 (1983).[1]

Citing the three-part test of the majority below, but relying *only* on the test involving defendants' subjective intent, the district court found on remand that *all* of the challenged proceedings—including those in which the railroads had been successful, those in which the railroads

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[1] The district court's initial memorandum opinion did not reach the legal issue that later divided the court of appeals panel. However, the recommended opinion submitted to the district court by Special Master John F. Sutton, former Dean of the University of Texas Law School, addressed that issue squarely. Citing precedent as well as respected academic authorities, Dean Sutton determined that "[b]y definition, litigation judicially found to be meritorious is not and cannot be a sham." App. C, p. 77a.

had been defendants, and one in which a railroad had assisted a State Attorney General in prosecuting a successful suit—were sham litigation, and it once again ordered wholesale production of thousands of attorney-client documents. App. F. Petitioners have sought supplemental mandamus relief in the court of appeals on the ground that the district court's October 2, 1987, order fails in several respects to comply with the appellate court's writ of mandamus. *In re Burlington Northern, Inc., et al.*, No. 87-6115 (petition filed October 20, 1987). That petition is still pending.[2]

2. The litigation found by the district court to be "sham" includes two successful, consolidated challenges to the federal contract by which the ETSI plaintiffs had sought to obtain water from a Missouri River reservoir for use in their proposed pipeline. The district court correctly recognized in its initial opinion below that the "[r]ailroads were successful in [that] litigation." App. B, at 54a, n.56. In May 1984, the United States District Court for the District of Nebraska declared the water contract unlawful and permanently enjoined its performance. *Missouri* v. *Andrews*, 586 F. Supp. 1268 (D. Neb. 1984). That decision was affirmed by the Eighth Circuit. 787 F.2d 270 (8th Cir. 1986). Despite the fact that it had formally terminated the pipeline project in July 1984, ETSI sought en banc consideration and then review by this Court of the Eighth Circuit decision. This Court granted certiorari and will hear argument in the case this Term. See *ETSI Pipeline Project* v. *Missouri*, 107 S. Ct. 1346 (1987) (No. 86-939) (granting certiorari).

Two of the railroad defendants below participated in the successful *Andrews* lawsuits. Petitioner Kansas

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[2] The district court granted petitioners' request to stay the effectiveness of its October 2, 1987, document production order pending disposition of the supplemental mandamus petition, but declined to extend the stay pending disposition of this petition for certiorari. App. G, pp. 104a-105a.

City Southern Railway and several public interest groups brought one of the *Andrews* suits.[3] Petitioner Union Pacific Railroad was indirectly involved in the companion *Andrews* suit that was brought by the States of Missouri, Nebraska and Iowa, downstream states dependent upon the Missouri River water that would have been diverted to ETSI's pipeline. At the request of Nebraska's Attorney General, Union Pacific, through its outside counsel Covington & Burling, provided Nebraska with legal research and drafting assistance on issues of federal law raised by the ETSI water contract.

The litigation found by the district court to be sham also includes the railroads' *defense* of about 60 lawsuits brought against them by the ETSI plaintiffs during the late 1970s. Each of those lawsuits sought, among other things, judicial confirmation of ETSI's right to construct its proposed pipeline beneath a specific location on a railroad's right-of-way. The central issues in the cases were the nature and quality of ETSI's property interests as against those of the railroads, and the propriety of the broad relief sought by ETSI. Several of the suits were litigated, yielding reported decisions.[4] In the vast majority, however, the defendant railroads simply filed an answer and, without taking any discovery or filing any motions, agreed to a stipulated judgment that recognized the superiority of the railroad's property interest and provided ETSI with more limited relief than that sought in its complaint. App. C, pp. 73a-74a.

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Relying on the test prescribed by the court of appeals, the district court recently concluded, without explanation

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[3] While KCS' standing was challenged in *Andrews*, the district court did not finally resolve that issue. Thus, KCS remained a party to the litigation, and it has participated as a respondent in the review proceedings before the Eighth Circuit and this Court.

[4] See, *e.g.*, Energy Transportation Systems, Inc. v. Union Pacific R.R., 619 F.2d 696 (8th Cir. 1980); Energy Transportation Systems, Inc. v. Union Pacific R.R., 606 F.2d 934 (10th Cir. 1979).

or citation to the evidence, that the railroads had lacked a "genuine desire for judicial relief" in each of the challenged proceedings. The trial court expressly declined to consider the objective reasonableness of the railroads' position in any proceeding or the interests of any railroad that afforded a reasonable basis for party standing. App. F, pp. 88a, 92a. Nonetheless, on the basis of the subjective prong of the court of appeals' three-part test, the district court held the railroads' participation in those cases to be a "crime or fraud" warranting abrogation of the attorney-client privilege, and ordered the release of thousands of attorney-client documents. *Id.* at 94a-95a.

## REASONS FOR GRANTING THE PETITION

The majority below held that participation in litigation would violate the antitrust laws if the litigant lacked a genuine desire for judicial relief, regardless of the objective reasonableness of the litigant's position or conduct in the challenged proceeding. The majority concluded that this test should be applied when the antitrust defendant had been successful in the challenged suit, when the antitrust defendant had been a defendant in the challenged suit, or when the antitrust defendant's participation in litigation consisted only of assisting a sovereign State government in prosecuting a successful suit.

The decision of the court of appeals establishes an unprecedented legal standard that conflicts in several important respects with the decisions of other appellate courts regarding the extent of protection conferred under the *Noerr-Pennington* doctrine. The standard is inconsistent with this Court's conclusion in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), that litigants should not be deprived of first amendment protection unless the suits they bring are baseless. The decision below, which is likely to chill the first amendment rights of litigants in many future cases and to create numerous practical problems for courts and litigants, reflects the significant

confusion among the lower courts regarding the circumstances in which petitioning conduct may be subject to antitrust liability.

In the quarter century since this Court first articulated the *Noerr-Pennington* doctrine, several hundred reported decisions of the lower federal courts have addressed the application of the doctrine to petitioning conduct challenged under the antitrust laws. Unfortunately, the lower courts have had little guidance from this Court regarding the scope of the "sham" exception to the doctrine, under which *Noerr-Pennington* protection may be lost for petitioning conduct found to be "nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144.[5]

Lacking guidance about the content and scope of the sham exception, the lower courts have fashioned several different and inconsistent tests by which to evaluate challenged petitioning conduct. Most courts have applied an *objective* test, seeking to assess the antitrust defendant's conduct by weighing the reasonableness of its position in the challenged litigation. Under the objective test, which is endorsed by Professor Handler, Professor Areeda and other distinguished antitrust commentators, successful petitioning conduct, absent fraud upon or collusion with the court, could not be classified as sham as a matter of law.

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[5] In contrast, this Court has provided substantial guidance concerning the forums to which that protection applies. See, *e.g.*, Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (legislatures); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (executive officials); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (administrative agencies and courts).

In addition, this Court recently agreed to review a *Noerr-Pennington* case presenting a similar "forum" issue: Whether a trade association that formulates "model codes" for submission to state governments is a forum to which *Noerr-Pennington* protection applies. Allied Tube & Conduit Corp. v. Indian Head, Inc., 108 S.Ct. 65 (1987) (No. 87-157).

Other courts have adopted a *subjective* test, focusing on the "genuineness" of the antitrust defendant's desire for judicial relief in the challenged suit. The subjective test, which often confronts the antitrust defendant with a choice between defending its conduct on the merits and maintaining its attorney-client privilege, virtually precludes summary disposition of even frivolous antitrust challenges to petitioning conduct.[6]

The court below, rather than selecting one of these tests, held that the antitrust defendant must satisfy *both* standards—and also prove a reasonable basis for party standing in the challenged suit—in order to receive the protection afforded by the *Noerr-Pennington* doctrine. That decision conflicts directly with the holdings of other Circuits and prior decisions of this Court, all of which would recognize *Noerr-Pennington* protection for litigation conduct founded upon a reasonable expectation of judicial relief. Moreover, the court of appeals' three-part test chills protected first amendment rights, unnecessarily requires relitigation of prior disputes in an antitrust forum, and invites retaliatory antitrust suits and counterclaims that would not be subject to summary disposition.

There is an extensive and increasing quantity of litigation in the lower courts involving the sham exception to the *Noerr-Pennington* doctrine.[7] This case presents an opportunity for this Court to resolve direct and widespread conflicts and to provide substantive and definitive guidance to the lower courts on important issues of antitrust and constitutional law.

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[6] Even courts that have adopted a subjective test would protect successful litigation from antitrust liability. See p. 11, below.

[7] See *generally* Handler & DeSevo, *The Noerr Doctrine and its Sham Exception*, 6 Cardozo L. Rev. 1, 30 (1984). Professor Handler's article, which contains an extensive catalogue of *Noerr-Pennington* cases through mid-1984, is reproduced as Appendix I, pp. 107a *et seq.*

## I. THE OPINION OF THE PANEL MAJORITY CONFLICTS WITH VIRTUALLY EVERY POST-*NOERR* APPELLATE DECISION ADDRESSING THE QUESTIONS PRESENTED FOR REVIEW.

### A. Successful Litigation.

In the 26 years since the *Noerr-Pennington* doctrine was announced, no court of which we are aware (other than the lower courts in this case) has ever held that, in the absence of fraud upon the court or collusion with the judge, successful litigation could violate the antitrust laws.[8] That record is hardly surprising. As Professor Handler recently wrote, it "should be self-evident that a suit cannot, in any sense of the word, be 'sham' where it has been found meritorious." Handler, *supra*, at 30 (App. I, pp. 152a-153a); *accord*, P. Areeda & H. Hovenkamp, *Antitrust Law* 11 (1986 Supp.) ("successful judicial action is not a 'sham,' regardless of the motive of the plaintiff in [the challenged] action.").[9]

The majority below, however, held that "objective reasonableness—as manifested by the court's grant of relief on the claim"—should not "substitute for proper consideration of any evidence the plaintiff might provide of the [successful] petitioner's motivation." App. A, pp. 19a, 18a. This holding directly conflicts with decisions of

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[8] See, *e.g.*, Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1257 n.17 (9th Cir. 1982) ("[W]e have found no case directly supporting the proposition that the bringing of meritorious suits can constitute sham suits violative of the antitrust laws.").

[9] Professor Areeda adopts that principle as "a strong presumption, rather than a categorical rule" (*id.* at 13) to accommodate three specific exceptions, none of which is relevant here: (1) serious discovery abuses in the successful proceeding (*id.*); (2) "collusion" between the successful litigant and the judge (*id.*); and (3) a successful suit known by the antitrust defendant to be wrongly decided (*id.*), a possibility that Areeda has characterized both as "a weak foundation on which to build a scheme of antitrust liability" and as virtually "impossible" (*id.* at 18).

at least four other Circuits on the same issue. The Third Circuit, for example, has held that "success on the merits" makes it "impossible . . . to prove bad faith." *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984). The Eighth, Ninth and District of Columbia Circuit Courts are in accord. *E.g.*, *First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983) (sham litigation involves "baseless claims"), *cert. denied*, 464 U.S. 1042 (1984); *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).[10]

Without exception, every other appellate court to address the issue has held that, in the absence of fraud or collusion with the court, successful litigation cannot be a sham.[11] These holdings reflect the principle, recently reaffirmed by this Court, that litigation must be "baseless" before its constitutional protection may be revoked. In *Bill Johnson's Restaurants*, this Court observed that

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[10] *Cf.* Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., 827 F.2d 458, 465 n.5 (9th Cir. 1987) (success "not dispositive" if there is evidence of fraud or misrepresentations to the court). Even the Fifth Circuit previously had held that successful petitioning efforts cannot be a sham. Thus, in Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1500 (5th Cir. 1985), Judge Higginbotham observed that "in the absence of proof of a conspiracy with government officials, when [the antitrust] defendant succeeds, as here, in persuading the government to adopt his position, his petitioning conduct should not be considered sham activity."

[11] Of course, a successful suit would not immunize unlawful commercial conduct, if any, that the suit sought to enforce. See Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 662 (1977) (Stevens, J., dissenting) ("meritorious" suits to enforce "invalid patents, price-fixing agreements, and other illegal covenants in restraint of trade" do not immunize the antecedent unlawful conduct).

"sham litigation by definition does not involve a bona fide grievance." 461 U.S. at 743, quoting Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L. Rev. 39, 60 (1980). Justice White's opinion for a unanimous Court distinguished "meritorious action," which is lawful, from "baseless litigation [which] is not immunized by the First Amendment right to petition." *Id.* The Court held that improper "motive and lack of reasonable basis are *both* essential prerequisites" to abrogating the constitutional protection for petitioning conduct. *Id.* at 748 (emphasis added).

*Bill Johnson's Restaurants* was not itself an antitrust case. However, the Court expressly recognized that it was "following" the course it had adopted with regard to the " 'mere sham' exception" in the antitrust context. *Id.* at 744. Moreover, the principles articulated by this Court in *Bill Johnson's Restaurants* are rooted firmly in the history and purpose of the Sherman Act.

Reductions in competition resulting from *successful* litigation are caused by actions of the government—here, for example, an injunction barring enforcement of a contract—not by actions of the antitrust defendants. This Court has consistently held that "where a restraint upon trade . . . is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." *Noerr*, 365 U.S. at 136, citing *Parker* v. *Brown*, 317 U.S. 341, 351-52 (1943). If the government-imposed restraint is lawful, it would be anomalous to hold that petitioning conduct seeking such a restraint is unlawful. There is thus a definitive basis—in the Sherman Act as well as the first amendment—for refusing to hold successful litigation unlawful.[12]

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[12] "Simply put, *Noerr* cannot be harmonized with a holding that nonbaseless claims can be classified as sham merely because their assertion rests upon an improper motive." Handler, *supra*, at 40 (App. I, p. 168a). One reason, of course, is that "First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to

The holding of the majority below conflicts with decisions of other appellate courts that have reached the issue of successful petitioning, as well as the views of the leading antitrust commentators. This conflict, on an important issue of antitrust law and first amendment doctrine, alone presents a compelling reason for issuance of a writ of certiorari.[13]

**B. Defense of Litigation.**

The court below unequivocally refused to recognize any difference, for *Noerr-Pennington* purposes, between the prosecution and the defense of litigation. It held: "We perceive no reason to apply any different standard to defending lawsuits than to initiating them." App. A, p. 27a. This ruling conflicts with decisions of the Seventh Circuit and this Court. Moreover, it would place unacceptable burdens on the constitutional rights of defendants.

The Seventh Circuit, in contrast to the decision below, has squarely held that the defense of litigation cannot form the basis of an antitrust violation. *Brunswick Corp.* v. *Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). In *Riegel Textile*, the plaintiff asserted an antitrust violation based upon the defendant's allegedly fraudulent and groundless

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antitrust liability for his success." *Greenwood Utilities*, 751 F.2d at 1505. The losing party, moreover, should not be permitted "to retry prior disputes in an antitrust forum." P. Areeda, *supra*, at 32.

[13] Even if this Court were to reverse the Eighth Circuit's decision in the pending water rights litigation, see p. 5, above, this issue would not be moot. First, the railroads were successful in several of the other proceedings claimed to involve sham conduct. App. C, pp. 73a-74a. Moreover, "if a litigant succeeds in convincing a trial or appellate court that its case is meritorious then, regardless of the ultimate resolution of the action, *Noerr* applies." Handler, *supra*, at 32 (App. I, p. 156a); see also P. Areeda, *supra*, at 13.

defenses in a separate patent interference proceeding. 752 F.2d at 264, 271-72. The court flatly rejected the claim:

> "[W]hile harassing competitors by litigation that can fairly be described as malicious prosecution or abuse of process can violate the antitrust laws, we are pointed to no case where simply defending oneself in a proceeding brought by another has been held to be actionable . . . . You cannot start a suit, as [the plaintiff] in effect did here, and then sue the defendant [in a separate antitrust lawsuit] for refusing to default."

*Id.* at 271-72 (citation omitted). The Seventh Circuit affirmed dismissal of the antitrust suit on the pleadings, a fact that underlines the stark nature of the conflict created by the holding below.[14]

Moreover, this Court's decisions have strongly suggested that sham conduct necessarily involves offensive, voluntary petitioning undertaken to harass a competitor. Thus, in *California Motor Transport*, the Court described the alleged conduct as "concerted action . . . to *institute* state and federal proceedings." 404 U.S. at 509 (emphasis added). In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973) (emphasis added), the defendant had "*instituted* or sponsored [allegedly sham] litigation." Recently, in *Bill Johnson's Restaurants*, the Court again

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[14] The court of appeals below attempted to harmonize its decision with *Riegel Textile* by quoting with approval the Seventh Circuit's observation that "refusing to default" could not be a basis for antitrust liability. App. A, p. 27a. Under the test prescribed below, antitrust scrutiny apparently begins with the first affirmative action taken to defend the litigation subsequently challenged as sham. Thus, relying on the decision below, the district court in this case recently found that the railroads' "defenses" of the crossing rights cases, which in most instances simply involved filing an answer and negotiating a stipulated judgment, were unlawful. App. F, p. 90a. See p. 6, above. Such a result would not have been possible in the Seventh Circuit.

characterized sham litigation as "the *filing* of a lawsuit . . . for harassment purposes." 461 U.S. at 741 (emphasis added). In short, sham litigation is *offensive* litigation.

The court below failed to recognize the fundamental differences between initiating and defending a lawsuit. Defensive litigation is by its very nature passive or reactive. The defendant lacks control over the timing, forum, issues, and other key aspects of litigation. For these reasons, the defense of litigation simply does not implicate the antitrust concerns that warrant scrutiny of a lawsuit's initiation, which itself may threaten competition.

In the defensive setting, any competitive concerns would flow principally, if not entirely, from some commercial conduct antecedent to the litigation (here, an alleged group boycott)—conduct that is fully subject to the antitrust laws and that may be challenged directly. If the antecedent commercial conduct had diminished competition, the plaintiff presumably would have an antitrust remedy and the public interest would be protected. There would be no need to subject the defense of any resulting litigation to antitrust scrutiny and potential treble damage liability. If abuses occur in the defense of a suit, there are other remedies, including default, contempt and Rule 11 sanctions, to protect the judicial system and the plaintiff. See *generally*, Handler, *supra*, at 11, 14 (App. I, at 122a-123a, 126a-127a).

Even if a potential threat to competition were posed by defending oneself in litigation, that threat could not possibly outweigh the attendant burdens on constitutional rights resulting from the imposition of antitrust liability on the defense of litigation. Such liability would interfere with both first amendment rights to petition and fifth amendment due process guarantees of a defendant's right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972), quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)

(Brandeis, J.). *Accord, George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 384 (1933).

The proposed new rule of antitrust law, which takes no regard of the reasonableness of the defenses presented in the litigation challenged as sham, burdens the exercise of constitutional rights and fails to further any competitive goals. It is simply unjustified. Review by this Court is warranted to resolve the conflict between the Fifth and Seventh Circuits, and to reaffirm the fundamental difference between the defense and the prosecution of litigation in the context of the *Noerr-Pennington* doctrine.

**C. Assisting Government Litigation.**

The majority below held that petitioner Union Pacific Railroad was subject to antitrust liability for providing the State of Nebraska with research and drafting assistance in connection with a suit filed by Nebraska in which ETSI had an interest. The majority concluded that if a litigant lacked either "the right to petition the courts directly" or the appropriate subjective intent, it could not claim *Noerr* protection for "funding, encouraging and assisting the lawsuits of others." App. A. p. 26a.[15] Even if this general principle were appropriate in some circumstances, it clearly does not and should not apply when the lawsuits "fund[ed], encourag[ed] or assist[ed]" are those of a sovereign State government.

In the quarter century since the *Noerr-Pennington* doctrine was announced, there has *never* before been a case in which assisting a State government in litigation was held to be a violation of the antitrust laws. That is not surprising. *Noerr* itself held that "no

[15] Relying on that holding and notwithstanding respondents' concession that Union Pacific would have had standing to bring the claims successfully asserted by the State of Nebraska in *Missouri* v. *Andrews*, the district court held that the litigation assistance afforded the State by Union Pacific was a "sham." App. F, pp. 90a-91a, 93a.

violation of the [Sherman] Act can be predicated upon mere attempts to influence the . . . enforcement of laws" or upon efforts "to persuade . . . the executive to take particular action with respect to a law." 365 U.S. at 135, 136. In every prior instance in which an antitrust defendant had helped the government take action against a competitor, the federal courts have held the defendant's actions immune from liability; none made an inquiry into the defendant's "standing" or "subjective intent."

The holding below conflicts directly with decisions of the Fourth, Ninth and Tenth Circuits. In the most recent example, the Fourth Circuit affirmed summary judgment for an antitrust defendant that had informed a State's Attorney of possible fraud by a competitor, provided the State with the results of its own investigation, and assisted the State police in searching the competitor's premises. *Ottensmeyer* v. *Chesapeake & Potomac Telephone Co.*, 756 F.2d 986 (4th Cir. 1985). Holding that such efforts to influence the enforcement of laws against a competitor were protected by *Noerr-Pennington*, the court squarely rejected the plaintiff's antitrust claims. *Id.* at 994. The court noted that independent police confirmation of the allegations "effectively nullified any allegations of a sham." *Id.*

The Ninth Circuit has twice reached the same result where a private party assisted a State Attorney General's action against a competitor. *Forro Precision, Inc.* v. *IBM Corp.*, 673 F.2d 1045, 1060 (9th Cir. 1982); *Harman* v. *Valley National Bank*, 339 F.2d 564, 566 (9th Cir. 1964). The Tenth Circuit is in accord, having held that efforts to persuade a state official to bring suit against a competitor are "exempt from the antitrust laws." *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1365-66 (10th Cir. 1972). See also Handler, *supra*, at 18 n.74 (App. I, p. 134a).

Under the holdings of the Fourth, Ninth and Tenth Circuit Courts and this Court's holding in *Noerr*, Union

Pacific's assistance to the State of Nebraska in prosecuting *Andrews* would clearly be protected. That assistance—research and drafting on issues of federal water law—is at the very core of *Noerr* protection, which is intended to ensure that the Sherman Act does not "deprive the government of a valuable source of information." *Noerr*, 365 U.S. at 139. Because two federal courts have independently endorsed the position advanced by the State with the support of Union Pacific (see pp. 5-6, above), *Noerr* protection is particularly appropriate in circumstances such as those presented here. There is no conceivable rationale for holding unlawful or penalizing litigation assistance to a government party—especially when it leads to a successful result.

This Court should grant certiorari to resolve the conflict between the decision below, on the one hand, and decisions of this Court and three other Circuits, on the other, and to eliminate the chilling effect of the decision below on cooperation with government officials.

**D. Appropriate Test For Sham Litigation.**

The court of appeals below adopted a new rule of law that allowed the district court to find, without regard to the reasonableness of petitioners' litigation position and conduct, that their petitioning was a sham not entitled to *Noerr-Pennington* protection. Under the holdings of at least six other courts of appeals, petitioners' participation in virtually all of the proceedings found below to be "sham" would have been held immune from antitrust liability.

The appellate courts are divided and confused over whether allegedly sham litigation should be evaluated by a "subjective" test of the antitrust defendant's motives, such as that used by the district court below, or an "objective" standard which, under the test prescribed by the court of appeals below, need not even be considered. The Third, Sixth, Eighth, Tenth, Eleventh and District of Columbia Circuits have focused on *objective* proof

addressing the reasonableness of the antitrust defendant's claim and conduct in the challenged proceeding.[16] The Fourth, Fifth and Seventh Circuits, in contrast, have focused on *subjective* proof addressing the sincerity of the antitrust defendant's desire for judicial relief.[17] The case law in the Second Circuit [18] and Ninth Circuit [19] is either inconclusive or internally inconsistent on the issue.

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[16] Columbia Pictures Industries v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) ("impossible" to prove bad faith where antitrust defendant pressed "valid causes of action"); Westmac, Inc. v. Smith, 797 F.2d 313, 318 (6th Cir. 1986) (lawsuit raising a substantial legal issue is protected), *cert. denied*, 107 S. Ct. 885 (1987); Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484 (8th Cir. 1985) (litigation protected so long as it does not involve perjury, bribery, fraud, or clearly baseless conduct); Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1177 (10th Cir. 1982) (litigation protected so long as not "abusive of the judicial processes"); St. Joseph's Hospital, Inc. v. Hospital Corp. of America, 795 F.2d 948, 955 (11th Cir. 1986) (misrepresentations are actionable, delaying tactics in litigation are not despite anticompetitive purpose); Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 266 (D.C. Cir. 1981) (litigation protected so long as "not baseless or frivolous" and "abus[ive] of the judicial process"), *cert. denied*, 455 U.S. 928 (1982).

[17] Hospital Bldg. Co. v. Trustees of Rex Hospital, 691 F.2d 678, 688 (4th Cir. 1982) (focus on intent in bringing lawsuit), *cert. denied*, 464 U.S. 904 (1983); Pet. App. A, at 16a-17a (intent in filing lawsuit); Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982) ("true purpose" of the litigation), *cert. denied*, 461 U.S. 958, 983 (1983).

[18] See Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 896-97 (2d Cir. 1981) (litigation with a reasonable basis entitled to protection); Litton Systems, Inc. v. AT&T, 700 F.2d 785, 810-12 (2d Cir. 1983) (focus on intent, but by resort to objective indicia), *cert. denied*, 464 U.S. 1073 (1984).

[19] See Omni Resource Development Corp. v. Conoco, Inc., 739 F.2d 1412, 1414 (9th Cir. 1984) (focus on merits of claim in underlying suit); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1253-54 (9th Cir. 1982) (focus on genuineness of motives, as well as objective indicia of sham), *cert. denied*, 459 U.S. 1227 (1983).

Regardless of which test is used, many of the cases finding a sham (including the decision below) also conflict with this Court's unanimous decision in *Bill Johnson's Restaurants*, which held that improper "motive *and* lack of reasonable basis are *both* essential prerequisites" to abrogating the constitutional protection for petitioning conduct in an unfair labor practice proceeding. 461 U.S. at 748 (emphasis added). In other words, under the test prescribed by this Court in *Bill Johnson's Restaurants*, either objective proof of a reasonable basis for the challenged claim *or* subjective proof of a sincere desire for judicial relief would be sufficient to *preclude* liability for petitioning conduct.[20]

In contrast, the court below held that objective proof need not even be considered when assessing challenges to the constitutional protections afforded by *Noerr-Pennington*. The court of appeals' three-part disjunctive test, failure of any one part of which would abrogate first amendment protection, is inconsistent with the decisions of *every* appellate court that has addressed this issue. Moreover, as recognized in the partial dissent below (App. A, p. 31a), the panel majority's test is inconsistent with the approach of this Court in *Bill Johnson's Restaurants*—that if a lawsuit is not baseless, it is entitled to *Noerr-Pennington* protection.

The commentators, like the courts, are divided on this issue. Professor Areeda, for example, argues vigorously against a "subjective standard," which requires assessment of "a jumble of mixed impulses, even if we

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[20] This Court has applied the same test to speech protected by the first amendment, holding that public figures must prove both improper motive (malice) and objective invalidity of the defaming statement (falsity) in order to recover on a libel claim. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986). See also McDonald v. Smith, 472 U.S. 479, 484 (1985) (citing *Bill Johnson's Restaurants* and *California Motor Transport* for the proposition that the petition clause does not grant immunity from liability for statements that are both malicious and baseless).

succeed in identifying the particular human being(s) whose intention is relevant." P. Areeda, *supra*, at 10-11. According to Areeda,

> "[t]he critical issue in applying the sham exception [is] determining what constitutes an *objectively reasonable* invocation of governmental machinery."

*Id.* (emphasis added). Professor Handler is in accord:

> "If . . . there is a reasonable basis for suit, then, as in *Noerr*, improper intent and extrinsic misconduct are irrelevant from an antitrust standpoint, though they may be punishable under other laws. That is an administratable doctrine."

Handler, *supra*, at 13 (App. I, p. 126a).

Judge Bork, in contrast, would focus on the litigant's subjective intent and, in the absence of fraud upon the court, would allow antitrust liability only if there were proof of a wrongful specific intent. R. Bork, *The Antitrust Paradox* 357-59 (1978); see *also Grip-Pak*, 694 F.2d at 472 (Posner, J.) (the "difficulty of determining the true purpose is great but no more so than in many other areas of antitrust law"). See *generally* Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 98-99 (1985).

The conflict among the Circuits and the extensive confusion over the appropriate test to be applied have resulted in practical problems for the lower courts since Justice Douglas first hinted in *California Motor Transport* that antitrust violations might be premised on abuses of the judicial process. See 404 U.S. at 512.

> "It is no wonder that the lower courts have been mystified by the Douglas dictum and have been at sea as to the proper weight to be attributed to the fact that litigations were unsuccessful or were tainted by conduct that our society does not and should not condone."

Handler, *supra*, at 12-13 (App. I, p. 125a); see *also* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 104 (1977) ("The determination of whether petitioning activity is a sham . . . has been plagued by considerable confusion.").

The decision below, which combines various tests in an unprecedented manner, is a product of the confusion that has reigned in this area for decades. The decision, which subjects petitioners to liability for conduct that would be protected in other Circuits, presents the Court with a vehicle both to correct the error in this case and to resolve the confusion and conflicts in this important area of law.

## II. THE DECISION BELOW WILL HAVE SIGNIFICANT, ADVERSE PRACTICAL CONSEQUENCES IN FUTURE CASES.

The decision below is likely to have several important, adverse practical effects. It will clearly have a chilling effect on the exercise of first amendment rights. Companies with meritorious claims against competitors will be deterred from bringing suits, participating in administrative proceedings and even filing amicus briefs—not only by the broadened risk of antitrust liability but also by recognition that, in light of the *subjective* component of the test prescribed below, a retaliatory antitrust suit would probably not be subject to summary disposition. The latter factor, of course, will also add significantly to the burden imposed on the federal court system.[21]

Furthermore, such companies also face the prospect of being ordered (like petitioners in this case) to produce otherwise privileged documents when plaintiffs invoke the "crime-fraud" exception to the privilege. This prospect will surely discourage attorney-client communications

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[21] The district court below denied the railroads' motion for partial summary judgment with regard to the successful *Andrews* litigation. App. H.

and generation of attorney work product where companies are engaged in disputes with their competitors.

Moreover, the majority's opinion will inhibit cooperation with federal, state and local officials who have authority to investigate, pursue or prosecute violations of law by a competitor. Application of the decision below to future cases "might unduly interfere with the proper functioning of government agencies, since the antitrust court would be reviewing government action outside the customary channels of judicial review." *Greenwood Utilities*, 751 F.2d at 1500.

Finally, each component of the new hybrid rule prescribed below would adversely affect litigants and the court system if it were imposed as a prerequisite for *Noerr-Pennington* protection. The objective component invites antitrust plaintiffs to relitigate issues that had been resolved in the challenged proceedings. Principles of judicial economy, comity, and common sense counsel strongly against allowing losing parties "to retry prior disputes in an antitrust forum." P. Areeda, *supra*, at 32. There is no reason to force antitrust courts and juries to resolve collateral attacks involving complex legal issues far removed from the policy objectives of the Sherman Act.

On the other hand, the subjective component of the test will be very difficult for the lower courts to administer.[22] A subjective test also may force the antitrust defendant, in order to defend its petitioning conduct on the merits, to waive its attorney-client privilege, an impermissible burden on the exercise of first amendment rights.

The holding of the panel majority below, which requires the antitrust defendant to offer *both* objective and subjective proof, therefore combines the worst features of each test in a manner that threatens (and in the

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[22] See, *e.g.*, P. Areeda, *supra*, at 10-11; Handler, *supra*, at 12-13 (App. I, p. 125a).

case below abrogates) both first amendment rights and the attorney-client privilege. In contrast, the test in *Bill Johnson's Restaurants*, which bases *Noerr-Pennington* protection on *either* the objective reasonableness of the defendant's position in the challenged suit *or* the sincerity of its desire for judicial relief, resolves this tension in a manner consistent with *Noerr*, the first amendment right to petition, and the goals of antitrust enforcement.

The serious problems discussed above are not limited to a mere handful of cases. There have been hundreds of *Noerr-Pennington* cases over the last quarter century, and the number has been increasing steadily. Professor Handler reports that there were as many *Noerr-Pennington* cases decided between 1980 and mid-1984 as there had been in the prior 20 years. Handler, *supra*, at 14 *et seq.* (App. I, p. 128a). And the recently reported cases suggest that the rate of increase is steadily growing. The decision below, if allowed to stand, surely will accelerate that trend.

## III. THE ISSUES PRESENTED WARRANT IMMEDIATE REVIEW BY THIS COURT.

That the issues presented have arisen before trial does not diminish the compelling need for immediate review by this Court. On the basis of the decision below, petitioners have been ordered to produce thousands of documents that would otherwise be protected by the attorney-client privilege. Unless the Court grants review at this stage, petitioners will be required to produce those documents—a result that could not be undone by review at a later time.

In granting the writ of mandamus below, the court of appeals recognized the "exceptional circumstances" warranting "immediate review" of the issues presented, including the issues' "important and potentially far-reaching" nature, the irreparable injury associated with erroneous disclosure of thousands of privileged documents,

and the fact that resolution of these issues will "likely have a determinative impact on the course of the case" below. App. A, p. 6a. The same circumstances warrant this Court's immediate review of the issues presented.

Particularly where denial of review would allow abrogation of the attorney-client privilege, the writ of certiorari has been issued whenever the questions presented independently warranted this Court's review. *E.g.*, *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343 (1985); *Decker* v. *Harper & Row Publishers, Inc.*, 400 U.S. 348 (1971) (affirming by an equally divided court a writ of mandamus addressing attorney-client privilege issues).

This Court has also granted immediate review in similar circumstances when, as here, the questions presented were "fundamental to the further conduct of the case" or of substantial importance. See, *e.g.*, *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985) (scope of immunity under the petition clause of the first amendment for expressing malicious falsehoods); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

In the absence of immediate review, the court of appeals' erroneous standard will likely become the basis for jury instructions at the end of a very lengthy, costly and complex trial, which is scheduled to begin in the spring of 1988. Those "eventual costs . . . will certainly be less if [this Court] now pass[es] on the questions presented here rather than send[ing] the case back with those issues undecided." *Gillespie*, 379 U.S. at 153 (immediate review of mandamus decision sustaining pre-trial district court order). Finally, while arguably not as important as the other considerations warranting review, this case involves multi-billion dollar claims, a factor that this Court has not overlooked in evaluating whether to grant petitions for

certiorari in the past. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 211 n.7 (1983) (citing $100 million in claimed damages as among the considerations warranting review).

## CONCLUSION

Given the extensive and increasing quantity of litigation involving the "sham" exception to the *Noerr-Pennington* doctrine, the time is now ripe for this Court to provide substantive guidance on the exception's scope and content. This petition presents an extraordinary opportunity to do so. Each of the four questions presented addresses a conflict among the Circuits on an issue of substantial importance to both antitrust law and constitutional doctrine. Together they offer an opportunity to resolve issues of law that, in the absence of straightforward guidance from this Court, have confused and divided the lower courts and commentators for a quarter century. A writ should be issued to resolve all four questions presented.

Respectfully submitted,

B.J. BRADSHAW
RICHARD N. CARRELL
LAYNE E. KRUSE
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, TX 77010
(713) 651-5151

HENRY P. SAILER
GREGG H. LEVY *
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

JOHN G. BISSELL
STRONG, PIPKIN, NELSON & BISSELL
595 Orleans Street
Beaumont, TX 77701
(409) 835-4581

*Attorneys for Petitioners Union Pacific Railroad Company, Union Pacific Corporation and Missouri Pacific Railroad Company*

O. J. WEBER, JR.
MEHAFFY, WEBER, KEITH & GONSOULIN
P.O. Box 16
Beaumont, TX 77704
(409) 835-5011

JOHN H. SHENEFIELD *
PETER E. HALLE
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

*Attorneys for Petitioners*
*Kansas City Southern Industries, Inc. and*
*Kansas City Southern Railway Company*

LOUIS B. PAINE, JR.
BUTLER & BINION
1600 Allied Bank Plaza
Houston, TX 77002
(713) 237-3111

JOHN R. LABOVITZ
MARK F. HORNING *
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

*Attorneys for Petitioners*
*Burlington Northern, Inc. and*
*Burlington Northern Railroad Company*

WALTER J. CRAWFORD, JR.
WELLS, PEYTON, BEARD, GREENBERG, HUNT & CRAWFORD
624 Petroleum Building
550 Fannin Street
Beaumont, TX 77704
(409) 838-2644

GARY SENNER *
STEVEN H. FRANKEL
SONNENSCHEIN CARLIN NATH & ROSENTHAL
233 S. Wacker Drive
8000 Sears Tower
Chicago, IL 60606
(312) 876-8059

*Attorneys for Petitioner*
*Chicago and North Western Transportation Company*

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* Counsel of Record